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Office of Administrative Law Judges
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Issue Date: 04 May 2004

In the Matter of:

JAMES A. ROBERTS
Claimant

Case No.: 2002 BLA 5508

v.

TENNESSEE CONSOLIDATED COAL CO./
UNDERWRITERS SAFETY AND CLAIMS
Employer/Insurer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Appearances: Mr. Paul D. Cross, Attorney
For the Claimant

Mr. Thomas S. Kale, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER
– DENIAL OF MOTION TO DISMISS
– DENIAL OF BENEFITS

This matter involves a claim filed by Mr. James A. Roberts for disability benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"). Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who died due to pneumoconiosis. Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

Procedural Background

First Claim

Mr. Roberts filed his first application for black lung disability benefits on October 7, 1975 (DX 1-31).[1] A January 1976 pulmonary examination by Dr. E. Wayne Gilley found no evidence of coal workers' pneumoconiosis. The chest x-ray was negative and other tests showed only a mild impairment due to asthmatic bronchitis. In September 1976, Dr. Sheldon E. Domm reached a different conclusion. He found the chest x-ray evidence positive for pneumoconiosis and noted an obstructive impairment based on other evidence. As a result, he diagnosed coal workers' pneumoconiosis and moderate pulmonary obstruction. In December 1977, the District Director, U.S. Department of Labor ("DOL"), denied Mr. Roberts' claim due to failure to prove any element of entitlement. After a blood gas study was submitted demonstrating a mild impairment, the District Director again denied the claim in June 1979. Through counsel, Mr. Roberts appealed and in May 1980, the case was forwarded to the Office of Administrative Law Judges ("OALJ").

On December 11, 1980, Administrative Law Judge Stuart A. Levin conducted a hearing. Then, on January 6, 1982, Judge Levin denied Mr. Roberts' claim. In his specific findings, Judge Levin determined that Mr. Roberts had at least ten years of coal mine employment and that he smoked a pack of cigarettes a day for twenty years. Based on his length of coal mine employment and Dr. Domm's opinion, Mr. Roberts was able to invoke the presumption under Part 727 (a) (4) that he was totally disabled due to coal workers' pneumoconiosis. However, Judge Levin determined that the presumption had been rebutted by more probative chest x-ray interpretations showing the absence of pneumoconiosis and more probative medical opinions by two physicians, including Dr. Gilley, establishing Mr. Roberts did not have coal workers' pneumoconiosis.

Second Claim

Initial Application

On January 25, 1983, based on complaints of shortness of breath and persistent cough, Mr. Roberts filed another black lung disability claim (DX 1-1). In March 1983, the District Director denied the duplicate claim on the basis of the denial of the first claim, noting Mr. Roberts had failed to prove any element of entitlement (DX 1-2). A few months later, Mr.

[1]The following notations appear in this decision to identify exhibits: DX – Director exhibit; CX – Claimant exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript. Mr. Roberts' prior two claims are grouped together in DX 1, containing over a thousand pages. Within those documents, Mr. Roberts' first claim, which he filed in 1975, is completely contained within one exhibit marked: "DX 1-31." Actions relating to Mr. Roberts' second claim through the transmittal of the record to the Office of Administrative Law Judges in October 1997 still retain their original Director exhibit numbers, although they are now filed under DX 1. As a result, references to the second claim, through October 1997, will be as follows: "DX 1-15" The first number refers to the present Director exhibit number; the second number identifies the previous Director exhibit number within DX 1. After October 1997, none of the remaining documents in the second claim were marked with individual Director exhibit numbers so they are filed in chronological order and identified solely as "DX 1."

Roberts' counsel submitted a medical evaluation by Dr. Daniel Dupourque who diagnosed chronic bronchitis (DX 1-8). An accompanying pulmonary function test met the regulatory standards for total disability. In September 1984, Mr. Roberts' attorney provided another medical examination from Dr. R. D. Ivey. Upon obtaining a blood gas study that showed total disability and chest x-ray revealing pulmonary fibrosis and emphysema, Dr. Ivey diagnosed total disability due to pneumoconiosis (DX 1-9). After receiving the new evidence, the District Director simply forwarded the case to OALJ (DX 1-10).

Administrative Law Judge E.V. McElroy conducted a hearing in February 1987 (DX 1-10 and DX 1-11). On October 4, 1988, Judge McElroy denied the second claim solely on the basis of the denial of the first claim (DX 1-12). Mr. Roberts appealed the decision. However, some time in 1990, while the appeal was pending before the Benefits Review Board ("BRB" and "Board"), Mr. Roberts submitted additional medical evidence, consisting of an unreadable chest x-ray and a non-qualifying pulmonary function test (DX 1-13 and DX 1- 19).

First Modification Request

Treating the newly submitted medical evidence as a request for modification, the Benefits Review Board remanded the case to the District Director on June 3, 1992 (DX 1-23). Also in June 1992, Dr. Rodney C. Bryant informed Mr. Roberts' attorney that his pulmonary evaluation of June 12, 1992 disclosed Mr. Roberts was totally disabled by pneumoconiosis (DX 1-25). Dr. Bryant reported Mr. Roberts had 12 years as a coal miner; the chest x-ray interpretation was consistent with black lung disease; distant breath sounds were present; the pulmonary function test indicated the presence of a moderate obstructive impairment that did not respond to bronchodilator therapy; and, the blood gas study produced non-qualifying results for total disability under the regulations (DX 1-26). Subsequently, Dr. Kraman found the pulmonary function test invalid due to less than optimum effort (DX 1-28) and Dr. Sargent found no evidence of pneumoconiosis on the June 12, 1992 chest x-ray (DX 1-27). On January 19, 1993, the District Director denied Mr. Roberts' modification request (DX 1-29). According to the District Director, Dr. Bryant had based his decision on invalid medical data and an inaccurate history of coal mining. In May 1993, Mr. Roberts' appealed the adverse decision and the case was returned to OALJ for another hearing (DX 1-30 and DX 1-32).

Prior to the hearing, Dr. Glen Baker conducted another pulmonary evaluation of Mr. Roberts on November 17, 1993 (DX 1-34). The chest x-ray was positive for pneumoconiosis; both the pulmonary function test and arterial blood gas study produced non-qualifying results; and, the lungs were clear upon physical examination. Indicating that the pulmonary tests showed a mild obstructive defect and mild to moderate hypoxemia, Dr. Baker diagnosed coal workers pneumoconiosis. He also concluded Mr. Roberts did not have the respiratory capacity to return to coal mining. In December 1993, Administrate Law Judge E. Earl Thomas conducted another hearing (DX 1-35). A few months later, in April 1994, concluding that Dr. Baker had presented a well documented and reasoned medical opinion, Judge Thomas determined Mr. Roberts had established a material change in condition and was entitled to benefits under the Act because he was totally disabled due to coal workers' pneumoconiosis (DX 1-36). On April 20, 1994, the Employer appealed the award of black lung benefits to Mr. Roberts (DX 1-37).

On November 29, 1995, the Benefits Review Board vacated Judge Thomas' award and remanded the case for further adjudication (DX 1-47). The Board first rejected the Employer's statute of limitations defense because it had not been initially presented to Judge Thomas. Next, the Board did not disturb Judge Thomas' finding that a material change in condition had occurred. However, due to a change in case law, the BRB determined Judge Thomas needed to re-adjudicate the claim and consider all the evidence in the record on the issue of entitlement to benefits.

Remand

On November 14, 1996, since Judge Thomas was no longer available, Administrative Law Judge Clement J. Kichuk re-adjudicated Mr. Roberts' claim (DX 1-50). Judge Kichuk concluded the x-ray evidence was insufficient to prove the presence of pneumoconiosis. Likewise, due to reasoning deficiencies in the medical assessments, Judge Kichuk determined medical opinion evidence did not support a finding of pneumoconiosis. Additionally, Judge Kichuk held neither objective medical tests nor medical opinion proved the presence of a total respiratory disability. Consequently, Judge Kichuk denied Mr. Roberts' duplicate claim because he failed to establish the requisite material change in condition.

Second Modification Request

In response, through counsel, on December 13, 1996, Mr. Roberts submitted a second modification request (DX 1-51). As part of his modification, Mr. Roberts eventually included a January 1996 pulmonary evaluation by Dr. Baker, indicating Mr. Roberts had a total disability due to pneumoconiosis (DX 1-54). In April 1997, Mr. Roberts also submitted Dr. Westerfield's diagnosis of total disability due to coal workers' pneumoconiosis (DX 1-62). On August 19, 1997, the District Director considered the additional conflicting radiographic and medical opinion evidence (DX 1-68). Convinced the more probative evidence did not establish either pneumoconiosis or total disability, the District Director denied the modification request. Mr. Roberts appealed on September 17, 1997 (DX 1-69) and the claim was returned to OALJ in October 1997 (DX 1-70). While the hearing was pending, Mr. Roberts also submitted Dr. Chandler's August 1996 diagnosis of coal workers' pneumoconiosis (DX 1).

After conducting a hearing in October 1998, Administrative Law Judge Jeffrey Tureck denied Mr. Roberts' modification request on May 24, 1999 (DX 1). Judge Tureck determined neither the objective medical evidence nor more probative medical opinion established the presence of pneumoconiosis or total disability. Specifically, for diverse reasons, he found the assessments of Dr. Baker, Dr. Westerfield, and Dr. Chandler had diminished probative value. Mr. Roberts appealed the adverse decision in June 1999 (DX 1).

On June 28, 2000, the Benefits Review Board affirmed Judge Tureck's denial of benefits (DX 1). Initially, the BRB emphasized that during the adjudication of Mr. Roberts' first claim, the only element of entitlement that was determined against him involved the presence of pneumoconiosis. Accordingly, the Board indicated that the duplicate claim/material change analysis should be limited to the determination of whether Mr. Roberts had established the presence of pneumoconiosis and noted that both Judge Kichuk and Judge Tureck had erred in

evaluating the evidence on total disability. Concerning the presence of black lung disease, the Board upheld Judge Tureck's finding that the preponderance of the more probative radiographic and medical opinion evidence failed to establish the presence of pneumoconiosis. Consequently, Mr. Roberts had failed to establish a change in condition since the prior denial and denial of his modification request was appropriate.

Third Modification Request

In March 2001, Mr. Roberts submitted additional medical evidence to the District Director consisting of a December 1999 pulmonary evaluation by Dr. Zeid finding total disability due to coal workers' pneumoconiosis (DX 1). The District Director treated the submission as a request for modification. On May 29, 2001, through his new counsel, Mr. Roberts expressed his desire to abandon his current modification request relating to his second claim because he intended to file a new claim (DX 1).

Third Claim

On November 30, 2001, Mr. Roberts filed his third claim for black lung disability benefits (DX 3). On August 5, 2002, the District Director determined Mr. Roberts was entitled to black lung disability benefits (DX 29). After the employer appealed the determination on August 16, 2002, the District Director forwarded the case to OALJ on September 16, 2002 for a hearing (DX 30 and DX 33). Pursuant to an Amended Notice of Hearing, dated February 26, 2003 (ALJ II), I conducted a hearing in Chattanooga, Tennessee with Mr. Roberts, Mr. Cross and Mr. Kale on March 27, 2003. My decision in this case is based on the hearing testimony and the following exhibits admitted into evidence: CX 1 and DX 1 to DX 33.[2]

Procedural Discussion

In preparing the procedural history for this case, I noted that the most recent document in DX 1, the exhibit that contains Mr. Roberts' first and second claims, is the claimant's counsel's May 2001 letter to the District Director indicating Mr. Roberts' intention to abandon his third modification request relating to the denial of his second claim. Notably absent in DX 1 is any indication that the District Director formally accepted the abandonment and denied the third modification request. Due to the absence of a formal response to the abandonment letter, an argument may be made that Mr. Roberts' third modification request remains unresolved. As a result, Mr. Roberts' third claim filed in November 2001 may actually represent a continuation of the third modification request to be adjudicated under 20 C.F.R. § 725.310 for change of condition and mistake of fact, rather than 20 C.F.R. § 725.309, as a subsequent claim.

Upon consideration of this procedural dilemma, for the reasons set out below, I have decided to proceed with adjudication of Mr. Roberts' third claim as a subsequent claim and not a continuation of the third modification request. Accordingly, I will adjudicate the November 2001 filing under the subsequent claim procedures set out in 20 C.F.R. § 725.309.

[2]I have also subsequently marked the Employer's Motion to Dismiss as ALJ IV and the Claimant's opposition to the motion as ALJ V.

First, at the March 2003 hearing, the Claimant and Employer agreed that Mr. Roberts' November 2001 claim represented a subsequent claim (TR, pages 7, 12 to 15, and 17). A representative of the District Director, a party in interest, did not enter an appearance at the hearing.

Second, and closely related, upon receipt of Mr. Roberts' November 2001 claim, the District Director adjudicated the merits of the case as a subsequent claim rather than a continuation of the third modification request.[3] The District Director's decision to process the November 2001 filing as a subsequent claim is significant. Having been previously made aware of Mr. Roberts' intention to abandon the third modification request in May 2001, the District Director implicitly accepted the abandonment of the earlier modification request by processing the November 2001 correspondence as a subsequent claim. That implicit acceptance essentially means Mr. Roberts' third modification request was denied due to abandonment.

Third, if Mr. Roberts' November 2001 claim is treated as part of the third modification request, then the evidentiary record might be significantly altered due to a recent change in the adjudication regulations. Since Mr. Roberts' filed his third claim in November 2001, and because the District Director viewed the filing as a subsequent claim, he applied the new black lung adjudication regulation, which became effective in January 2001 and contains substantial evidence restrictions. The extent to which these limitations favor or disfavor the respective parties is debatable. For instance, initially, the Employer offered two interpretations of the January 21, 2002 chest x-ray. Because the interpretations appeared to have an administrative error relating to the date of the x-ray, a representative of the District Director returned the interpretations. At that time, the representative emphasized that only one interpretation was admissible as rebuttal evidence (DX 22). After the correct date of the chest x-ray was established, the Employer offered only one interpretation. On the other hand, the evidence limitations may not have adversely affected the Employer because the company did not offer several other types of rebuttal evidence, such as a pulmonary examination, which would have been admissible even under the new regulations.

If the November 2001 claim were treated as part of the earlier third modification action, then it relates back to the 1983 filing date of the second claim. In that situation, the claim would be adjudicated under the old regulations which did not limit the parties' ability to present relevant evidence.

Additionally, because the District Director treated Mr. Roberts' November 2001 claim as a subsequent claim, DOL provided another full pulmonary examination for Mr. Roberts by Dr. Baker. If the November 2001 correspondence had been instead treated as a modification request, Mr. Roberts would not have been entitled to that DOL-funded examination. Thus, Dr. Baker's examination might be excluded if the case proceeds as a continuation of the third modification request.

[3]In correspondence to the parties, a representative of the District Director stated, "This is a re-filed claim rather than a modification request. . ." (DX 27 and DX 29).

Finally, all the parties conducted their litigation and developed medical evidence on the basis that the November 2001 claim is a subsequent claim. Altering that procedural basis at this point would be unfair to the parties. Such a change would also cause additional delay associated with a remand to the District Director to address the November 2001 filing as a continuation of the earlier third modification request.

ISSUES

1. Motion to Dismiss.

2. Cigarette smoking history.

3. Whether Mr. Roberts in filing a subsequent claim on November 30, 2001 has demonstrated that a change has occurred in one of the conditions, or elements, of entitlement, upon which the May 1999 denial of his most recent, prior modification request relating to his second claim for benefits, as affirmed by the Benefits Review Board, was based. Specifically, whether the medical evidence developed since May 1999 establishes the presence of pneumoconiosis.[4]

4. If Mr. Roberts establishes a change in one of the applicable conditions of entitlement, whether he is entitled to benefits under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

At the hearing, the parties stipulated to the following facts: a) Mr. Roberts was a coal miner with post-1969 coal mine employment; b) his length of coal mine employment was at least 13 years; c) Tennessee Consolidated Coal Company is the responsible operator in this case; and, d) Mrs. Stella Roberts is an eligible spouse for the purposes of augmenting any benefits that may be payable under the Act (TR, pages 10 to 12).

Preliminary Findings

Born on February 21, 1937, Mr. Roberts married Mrs. Stella Roberts on September 28, 1994 (DX 3 and DX 12). Mr. Roberts started mining coal for his father in the mid-1950s. Over the course of his coal mining career, Mr. Roberts was a coal loader, a cutting machine operator, and a roof bolter. In his last job, Mr. Roberts worked as a mechanic on mining equipment. While the mechanic work usually involved medium physical labor, Mr. Roberts would occasionally have to lift heavy equipment motors with the help of another individual. In 1975, when he continued to suffer bouts of pneumonia, Mr. Roberts stopped mining coal. (DX 5 and TR, pages 22 to 27).

[4]As previously discussed, the BRB has indicated that since Mr. Roberts' first claim only addressed the presence of pneumoconiosis, the analysis of subsequent claims is limited to whether that element of entitlement may now be established.

Issue # 1 – Motion to Dismiss

Prior to the hearing, counsel for the Employer presented a Motion to Dismiss Mr. Roberts' subsequent claim because it failed to meet the three year statute of limitations standard in 20 C.F.R. § 725.308 (ALJ IV). To support the motion, counsel referenced the decision in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), which states the statue of limitations begins to accrue on the date a physician first diagnoses a claimant as totally disabled due to pneumoconiosis. Since Mr. Roberts received such a diagnosis in 1997, counsel argued the claim he filed in 2001 is untimely and should be dismissed.

Mr. Roberts' attorney opposes the motion by noting the 20 C.F.R. § 725.309 permits the filing of subsequent claims and consideration of such claims upon a showing of a change in an applicable condition of entitlement (ALJ V). Additionally, counsel emphasizes that the 1997 diagnosis was subsequently rejected by an administrative law judge. As a result, it should not act as a timing trigger for the purposes of statute of limitations in 20 C.F.R § 725.308.

According to Black Lung Benefits Act, 30 U.S.C. § 932 (f), as implemented by 20 C.F.R. § 725.308 (a), if a black lung disability benefit claim is presented after March 1978, it "shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis" has occurred. Although a claim is presumed to be timely filed, 20 C.F.R. § 725.308 (c), that presumption may be rebutted. The regulation also provides at 20 C.F.R. § 725.309 (d) that multiple claims may be filed in an effort to obtain benefits under the Act. A tension between § 725.308 (a) and § 725.309 (d) develops when a former coal miner: a) receives a medical diagnosis of total disability due to pneumoconiosis; b) files a claim for black lung benefits; c) fails to prevail on his claim for benefits because he was unable to establish his entitlement to benefits; and, d) several years later files another claim for benefits. In such a situation, even though the subsequent claim could be considered under § 725.309 (d), it would nevertheless be untimely under § 725.308 (a) in light of the medical determination that initiated the first claim.

When presented with that type of situation, the U.S. Court of Appeals for the Sixth Circuit in *Kirk*, initially strictly followed the plain language of the statutory time requirements and concluded that any medical determination of total disability due to pneumoconiosis will start the three year claim filing clock running, even if the coal miner is unsuccessful with his black lung disability claim. *Id.* at 608.

Accordingly, under the court's strict interpretation of 30 U.S.C. § 932 (f) in *Kirk*, since Mr. Roberts received notification from a physician in 1997 that he was totally disabled due to pneumoconiosis, the subsequent claim he filed in November 2001 would be untimely and should be dismissed. That dismissal would stand even though the 1997 diagnosis that triggered the statute of limitations was later rejected by Judge Tureck in his 1999 decision to deny Mr. Roberts' second modification request to his second claim.

Apparently recognizing the potential hardship to coal miners filing subsequent claims caused by the *Kirk* court's strict application of the three year statute of limitation, the U.S. Court of Appeals for the Sixth Circuit returned to the statute of limitations issue in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed. Appx. 140, 2002 WL 31205502 (6th Cir. Oct. 2, 2002).[5] In a split decision, the court refined its application of the three year statue of limitations by requiring a proper medical determination to start the three year clock. In its analysis, the court reaffirmed its position that the three year statute of limitations applies to all claims under the Act, including subsequent claims under 20 C.F.R. § 725.309 (d). However, the court additionally adopted the reasoning of the U.S. Court of Appeals for the Tenth Circuit, in *Wyoming Fuel Co. v. Director,* OWCP, 90 F.3d 1502, 1507 (10th Cir. 1996) that the medical determination of total disability due to pneumoconiosis, which starts the statute of limitations running, does not include an apparent misdiagnosis of the disability or causation. *Dukes* at 145 and 146. Specifically, the court determined that:

> [I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a *proper* medical determination. *Id.* at 146.

With these principles in mind and based on the procedural history of this case, I note that Mr. Roberts received his first diagnosis of pneumoconiosis and a pulmonary impairment from Dr. Domm in 1976. However, Judge Levin's 1982 Decision and Order denying benefits in part on the basis that the medical opinion did not establish the presence of pneumoconiosis renders Dr. Domm's diagnosis an insufficient medical determination to trigger the three year statute of limitations clock.

Subsequently, Dr. Ivey in 1984, Dr. Bryant in 1992, and Dr. Baker in 1993, concluded Mr. Roberts was totally disabled due to coal workers' pneumoconiosis. Although Judge Thomas considered some of their opinions credible, his finding was vacated by the Benefits Review Board. Upon remand, Judge Kichuk reached a different conclusion and determined their respective diagnoses were insufficient to prove the presence of pneumoconiosis. Consequently, the medical opinions of Dr. Ivey (1984), Dr. Bryant (1992) and Dr. Baker (1993) are not "proper medical determinations" for the purpose of the statute of limitation.

In 1996 and 1997 respectively, Dr. Baker and Dr. Westerfield concluded Mr. Roberts had a respiratory impairment due in part to coal workers' pneumoconiosis. In his 1999 decision, Judge Tureck gave little probative weight to those two medical opinions. His conclusion negates the significance of the assessments by Dr. Baker (1996) and Dr. Westerfield (1997). Thus, neither opinion triggers the statute of limitations because they are no longer proper medical determinations.

[5]In accordance with the court's rules, since this is an unpublished case, I have attached the cited case to this decision.

Finally, the next medical opinion in the record indicating that Mr. Roberts is totally disabled by pneumoconiosis was presented by Dr. Zeid in December 1999. Since Mr. Roberts presented his November 2001 claim within three years of that diagnosis, his submission falls within the three year statute of limitations. In other words, since the denials of his prior claims gave him a "clean slate," the statute of limitations for filing a claim under the Act did not start to run until Dr. Zeid's December 1999 diagnosis. As a result, Mr. Roberts November 2001 claim is timely. The Employer's Motion to Dismiss Mr. Roberts' present claim as untimely is **DENIED**.

Issue # 2 – Cigarette Smoking History

As will be readily apparent during the discussion of the probative value of medical opinion in this case, the extent of Mr. Roberts' use of tobacco, specifically cigarettes, is a critical factor in the physicians' diagnoses.[6] In his 1982 Decision and Order, Administrative Law Judge Levin set out in his specific findings that Mr. Roberts had smoked a pack of cigarettes a day for twenty years. Although he did not appeal Judge Levin's decision, in subsequent proceedings, Mr. Roberts has asserted that finding is incorrect. In footnote 2 of his November 1996 Decision and Order, Administrative Law Judge Kichuk noted the discrepancy between Judge Levin's findings and Mr. Roberts' contrary 1993 testimony (DX 1-50). In 1999, Administrative Law Judge Tureck also commented on the discrepancy (DX 1). However, because the parties did not object to Judge Levin's finding that Mr. Roberts smoked cigarettes for 20 years, Judge Tureck believed he could not re-visit that issue. As a result, he used a significant cigarette smoking history of 20 pack-years[7] in his adjudication of Mr. Roberts' claim and the Benefits Review Board affirmed his determination (DX 1).

A principle of finality, entitled "law of the case," states that once an issue has been litigated and decided, it should not be re-litigated. *United States v. U.S. Smelting, Refining & Mining, Co.*. 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950), and *Brinkly v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990). However, departure from the "law of the case" rule is appropriate if continued application of the principle would constitute a "manifest injustice." *Cole v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988).

In Mr. Roberts' case, departure from the "law of the case" may be appropriate for two reasons. First, when Judge Levin conducted his 1980 hearing, Mr. Roberts was not asked about his cigarette smoking history and the issue was not fully developed at that time. The medical evidence containing the cigarette smoking history came into the record only after Mr. Roberts responded to questions at the hearing about his 1975 hospitalization; Judge Levin asked for a copy of the 1975 hospitalization record; and Mr. Roberts' attorney agreed to provide a copy to Judge Levin post-hearing. Subsequently, Judge Levin apparently relied on the medical report

[6]Another controverted history involved Mr. Roberts' length of coal mine employment. The parties stipulated before me that he had at least 13 years of coal mine employment. However, on various occasions, Mr. Roberts has claimed twenty years and more. Despite this discrepancy, I am not inclined to resolve whether Mr. Roberts' can prove that he worked more than 13 years in coal mines because: a) I believe the stipulated 13 years of coal mine employment establishes extensive exposure to coal dust; and, b) the discriminating factor in assessing the probative value of medical opinion in this particular case is not the length of coal mine employment reported to the doctor.

[7]A pack-year equals the consumption of one pack of cigarettes a day for one year.

from 1975 that indicated Mr. Roberts' social history included twenty years of smoking cigarettes. Notably, due to the timing of the document's admission, Mr. Roberts did not have an opportunity at the hearing to develop his version of the cigarette smoking history.[8] (DX 1-31, hearing transcript, pages 28 to 30)

Second, and more importantly, the extent of Mr. Roberts' cigarette smoking has a profound effect on the probative value of the medical opinions that support his entitlement to benefits. In light of his subsequent, persistent and adamant disagreement with Judge Levin's finding on his cigarette smoking history, I find a review of the evidence of Mr. Roberts' cigarette smoking history is important to determine whether continued application of Judge Levin's cigarette history finding will cause an injustice.

Within the record before me, the following evidence exists concerning Mr. Roberts' use of cigarettes.

Between April 11 and April 16, 1975, Mr. Roberts was admitted to Diagnostic Hospital for evaluation of epigastric abdominal discomfort and bowel lesions. In the admission notes, Dr. B. Daniel Hansberger reported under the caption "respiratory system" that Mr. Roberts was a "smoker of 1 pack per day for 20 years." His admission diagnosis included chronic obstructive airways disease associated with chronic bronchitis. A pulmonary function test request form for Mr. Roberts, completed the fourth day of his hospitalization, indicates he smoked "1 pk/day" for "22 years." (DX 1-31)

On June 16, 1981, during his pulmonary examination of Mr. Roberts, Dr. M. Fritzhand reported Mr. Roberts, "never smoked." (DX 1-31)

On June 12, 1992, Dr. R. C. Bryant annotated the following observation from his physical examination of Mr. Roberts: "nicotine stain on fingers." (DX 1-26 and DX 1-30)

In his November 1993 examination summary, Dr. Glen R. Baker stated Mr. Roberts "smoked on occasions as a boy, but not smoked any since he was a teenager." (DX 1-34)

In the December 1993 hearing with Judge Thomas, the following dialogue occurred between Mr. Roberts and his attorney, Mr. Noblett:

> Q (Mr. Noblett): Okay, sir. Do you have anybody. . . well, since 1980 anyway, have you smoked a pack of cigarettes a day?
>
> A (Mr. Roberts): No, sir, and that smoke record's wrong. I don't know how they got it on there, but it's wrong.
>
> Q: All right, sir. When was the last time that you did smoke any?

[8]As emphasized by Judge Tureck, Mr. Roberts could have appealed Judge Levin's denial of his claim and raised the issue of the incorrect cigarette smoking history at that time.

A: Well, when I went to school, you know, the boys smoked. I didn't smoke. My Daddy didn't allow me to smoke. They'd roll this Country Gentleman out at the bathroom and they'd smoke, you know, hand you a cigarette and you know how boy is, so I tried a few, but I didn't never take up the habit.

Q: Do you have any habit of smoking at this time?

A: No, sir.

Q: And have you had any habit since at least 1980?

A: No, sir. (DX 1-35, page 15)

In his June 1995 social history portion of his physical examination of Mr. Roberts, Dr. L. Frank Chandler checked "No" for tobacco use. Yet, in his August 1996 physical examination of Mr. Roberts, Dr. Chandler annotated: "tobacco: multiple pack year history." (DX 1-55)

In a January 1996 pulmonary examination, Dr. Glen Baker stated Mr. Roberts "was a non-smoker." (DX 1-54)

In a March 1997 black lung evaluation, Dr. B. Daniel Harnsberger stated Mr. Roberts "has been a nonsmoker all of his life." A blood gas study conducted at that time showed a carboxyhemoglobin level of 6.1%; the chart indicated less than 1.5% was the expected normal range. (DX 1-63)

In the report of an April 1997 pulmonary examination, Dr. B. T. Westerfield stated, "Mr. Roberts denies smoking, and he reports he never was a regular cigarette smoker." (DX 1-62)

In his December 1997 review of the medical record, Dr. James R. Castle observed that the arterial blood gas test conducted by Dr. Harnsberger in March 1997 showed an elevated level of carboxyhemoglobin.[9]

In August 1999, Mr. Roberts reported to Dr. Charles Moore that he had no tobacco use history.

Likewise, Dr. Zeid in December of 1999 indicated Mr. Roberts did not have significant tobacco abuse history.

In his 2001 treatment notes, Dr. Keith Lovelady indicated Mr. Roberts had stated he was "never a smoker."

[9]In his 1999 Decision and Order, Judge Tureck highlighted the March 1997 elevated carboxyhemoglobin level as an indication Mr. Roberts was still smoking. In light of that determination, he discredited the medical opinions of Dr. Baker and Dr. Westerfield because they were based on inaccurate smoking histories. The BRB affirmed his determination because it was supported by substantial evidence.

In January 2002, Dr. Glen Baker stated Mr. Roberts "never smoked."

At the March 2003 hearing, in the response to my question about whether he ever smoked cigarettes, Mr. Roberts responded, "No, sir. Just a little bit when I was going to school with the school boys and stuff." (TR, page 27). Mr. Roberts' son, James B., also testified that since his earliest memories from the 1960s, he has not seen his father smoke cigarettes. Additionally, the son testified no one smoked cigarettes in the house, so he was not exposed to secondary cigarette smoke (TR, pages 31, 32, and 66).

Discussion

In the presentation before Judge Thomas in 1993, Mr. Roberts adamantly maintained that Judge Levin's 20 pack-year cigarette use history was wrong. Additionally, in the hearing before me, Mr. Roberts and his son appeared to be sincere and candid witnesses. Such courtroom demeanor, ardor and sworn testimony stands in contrast to other objective evidence, including documented social histories obtained from Mr. Roberts that indicates he had more involvement with cigarette smoking than experimentation as a teenager. In evaluating this evidentiary conflict, I have spent some time considering Mr. Roberts' hearing presentations. I also acknowledge that Mr. Roberts' most consistent presentation to physicians was that he was not a cigarette smoker.

However, I note that Mr. Roberts himself is the principal source of the conflicting cigarette smoking histories. That is, when a physician records a social history, he obtains the information from the patient. Obviously, an administrative error may be made during this process and the wrong history may be recorded. However, in Mr. Roberts' case, on three separate occasions, physicians recorded his report of several pack-years of cigarette smoking. Specifically, upon Mr. Robert's admission to the hospital in 1975, when he was 38 years old, Dr. Harnsberger documented a 20 pack-year cigarette smoking history for him. A few days later, during the same hospitalization, Mr. Roberts' smoking history was listed as 22 pack-years. Then, some 21 years later, a different physician, Dr. Chandler, also reported a multi pack-year history of cigarette use.

My reluctance to dismiss these three medical annotations of extensive tobacco use as simply administrative errors is not just determined by the fact that a long term cigarette smoking history was recorded more than once. Significantly, these three reports do not stand alone. Two other objective items of evidence nestled in the record significantly point to more cigarette use than presented by Mr. Roberts in his hearing testimony. The 1992 observation of nicotine stains on Mr. Roberts' fingers and the exceptionally high carboxyhemoglobin level discovered in the 1997 blood gas study are physical symptoms consistent with cigarette smoking. Consideration of these later two observations, coupled with the three documented histories from Mr. Roberts of significant cigarette use, significantly diminish my confidence in the reliability of Mr. Roberts' more numerous assertions to other doctors and his sworn hearing testimony that his use of cigarettes was limited to an occasional smoke as a teenager.

On balance, the several objective items of evidence indicating a long term cigarette smoking habit sufficiently erode my confidence in Mr. Roberts' stated recollection to me and

several physicians of a negligible use of tobacco. As a result, I find application of Judge Levin's determination of a twenty pack-year history of cigarette smoking as the "law of the case" for the adjudication of Mr. Roberts' present black lung disability claim does not create a "manifest injustice."

Issue # 3 – Change in Applicable Condition of Entitlement

After the expiration of one year from the denial of benefits, the submission of additional evidence or another claim is considered a subsequent claim and adjudicated under the provisions of 20 C.F.R. § 725.309 (d). That subsequent claim will be denied unless the claimant can demonstrate that at least one of the conditions of entitlement upon which the prior claim was denied ("applicable condition of entitlement") has changed and is now present. 20 C.F.R. § 725.309 (d) (3). If a claimant does demonstrate a change in one of the applicable conditions of entitlement, then generally factual determinations made in the prior claim(s) are not binding on the parties. 20 C.F.R. § 725.309 (d) (4). Consequently, the relevant inquiry in a subsequent claim is whether evidence developed since the prior adjudication would now support a finding of a previously denied condition of entitlement.

The court in *Peabody Coal Company v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) put the concept in clearer terms:

> The key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct. To prevail on the new claim, therefore, the miner must show that something capable of making a difference has changed since the record closed on the first application.

Additionally, the United States Court of Appeals for the Sixth Circuit, in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), indicated consideration of a subsequent duplicate claim involves two steps. First, consistent with the regulatory guidance, I must evaluate "all of the new medical evidence obtained after the previous denial, both favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him." *Id.* at 608.

Second, the court requires that I compare "the sum of the new evidence" relating to the previously denied element of entitlement with "the sum of the earlier evidence on which the denial was based." *Id.* at 609. A "material change"[10] exists only if the new evidence: a) establishes the element of entitlement (as discussed above); and, b) "is substantially more

[10]The court presented these principles prior to issuance of the new regulations in January 2001. While the prior regulation on the processing of subsequent claims, 20 C.F.R. § 725.309 (d) (2000), utilized the term "material change in conditions," the new regulation no longer employs that phrase. However, under both the old and new provisions, the mandated analysis involves an evaluation of whether a change in an element of entitlement has occurred since the denial of the prior claim. As result, I believe the directions set out in *Kirk* remain viable in regards to the present 20 C.F.R. § 725.309 (d).

supportive of claimant [sic]."[11] *Id.* In other words, there must be showing that "worsening of the claimant's condition occurred." *Id*.

In adjudicating a subsequent claim by a living miner in which the applicable conditions of entitlement relate to the miner's physical condition, I focus on the four basic conditions, or elements, a claimant must prove by preponderance of the evidence to receive black lung disability benefits under the Act. First, the miner must establish the presence of pneumoconiosis.[12] Second, if a determination has been made that a miner has pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment.[13] Third, the miner has to demonstrate he is totally disabled.[14] And fourth, the miner must prove the total disability is due to pneumoconiosis.[15]

With those four principle conditions of entitlement in mind, the next adjudication step requires the identification of the conditions of entitlement a claimant failed to prove in the prior claim. In that regard, of the four principle conditions of entitlement, the two elements that are usually capable of change are whether a miner has pneumoconiosis and whether he is totally disabled. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997). That is, the second element of entitlement (pneumoconiosis arising out of coal mine employment) and the fourth element (total disability due to pneumoconiosis) require preliminary findings of the first element (presence of pneumoconiosis) and the third element (total disability).

In the adjudication of Mr. Roberts' first claim, Judge Levin determined that the presumption of coal workers' pneumoconiosis-related total disability was rebutted because the objective medical evidence established he did not have black lung disease. Since then, both in his second claim and related modification requests and his present third claim, the central issue for Mr. Roberts is whether he has pneumoconiosis. Consequently, for purposes of adjudicating Mr. Roberts' third claim for black lung disability benefits, I will evaluate the evidence developed since Judge Tureck's denial of benefits in May 1999 to determine whether Mr. Roberts can now prove the presence of pneumoconiosis.[16]

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[11]The court explained this second requirement precluded the situation in which both the old and new evidence were essentially the same but a legal error occurred in the earlier adjudication which prevented the claimant from establishing the entitlement element. The parties have only one year to correct such a legal error (through either appeal or the modification process under 20 C.F.R. § 725.310). After the passage of one year, the legal error may not be corrected, or re-litigated, through the subsequent claim process under 20 C.F.R. § 725.309 (d).

[12]20 C.F.R. § 718.202.

[13]20 C.F.R. § 718.203 (a).

[14]20 C.F.R. § 718.204 (b).

[15]20 C.F.R. § 718.204 (a).

[16]I note that over the course of numerous years, the medical evidence indicates that Mr. Roberts does have a significant pulmonary impairment.

Pneumoconiosis

"Pneumoconiosis" is defined as a chronic dust disease arising out of coal mine employment.[17] The regulatory definitions include both clinical, or medical pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as "any chronic lung disease arising out of coal mine employment."[18] The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201 (b). As courts have noted, under the Act, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. *Kline v. Director, OWCP*, 877 F.2d 1175 (3d Cir. 1989).

According to 20 C.F.R. §718.202, the existence of pneumoconiosis may be established by four methods: chest x-rays (§ 718.202 (a)(1)), autopsy or biopsy report (§ 718.202 (a)(2)), regulatory presumption (§ 718.202 (a)(3)),[19] and medical opinion (§ 718.202 (a)(4)). Since the record does not contain evidence that Mr. Roberts has complicated pneumoconiosis, and he filed his claim after January 1, 1982, a regulatory presumption of pneumoconiosis is not applicable. In addition, he has not submitted a biopsy report and the record obviously does not contain an autopsy report. As a result, Mr. Roberts will have to rely on chest x-rays or medical opinion to establish the presence of pneumoconiosis.

[17]20 C.F.R. § 718.201 (a).

[18]20 C.F.R. § 718.201 (a)(1) and (2).

[19]If any of the following presumptions are applicable, then under 20 C.F.R. § 718.202 (a)(3), a miner is presumed to have suffered from pneumoconiosis: 20 C.F.R. § 718.304 (if complicated pneumoconiosis is present, then there is an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis); 20 C.F.R. § 718.305 (for claims filed before January 1, 1982, if the miner has fifteen years or more coal mine employment, there is a rebuttable presumption that total disability is due to pneumoconiosis); and 20 C.F.R. § 718.306 (a presumption when a survivor files a claim prior to June 30, 1982).

Chest X-Rays

The following table summarizes all chest x-ray interpretations admitted into evidence:

Date of x-ray	Exhibit	Physician	Interpretation
January 21, 2002	DX 22	Dr. Wheeler, BCR, B[20]	Negative for pneumoconiosis.
(same)	DX 21	Dr. Baker[21]	Positive for pneumoconiosis, profusion category 1/0,[22] type p opacities[23]
(same)	DX 21	Dr. Sargent, BCR, B	[Quality reading only; however Dr. Sargent added a diagnosis of emphysema and queried "smoking history?"]

Dr. Baker and Dr. Wheeler disagree on whether the January 21, 2002 chest x-ray shows the presence of pneumoconiosis. Based on Dr. Wheeler's superior credentials as a dual qualified radiologist,[24] I give his negative interpretation of the January 21, 2002 x-ray greater probative weight than Dr. Baker's positive assessment. As a result, I find the January 21, 2002 film is negative for pneumoconiosis. The preponderance of the chest x-ray evidence is negative and Mr. Roberts is unable to establish the presence of pneumoconiosis in his lungs by radiographic evidence under 20 C.F.R. § 718.202 (a) (1).

[20]The following designations apply: B – B reader, and BCR – Board Certified Radiologist. These designations indicate qualifications a person may posses to interpret x-ray film. A "B Reader" has demonstrated proficiency in assessing and classifying chest x-ray evidence for pneumoconiosis by successful completion of an examination. A "Board Certified Radiologist" has been certified, after four years of study and examination, as proficient in interpreting x-ray films of all kinds including images of the lungs. *See also* 20 C.F.R. § 718.202 (a) (1) (ii).

[21]Although the record contains a B reader certificate for Dr. Baker, he did not have that qualification at the time that he interpreted this x-ray.

[22]The profusion (quantity) of the opacities (opaque spots) throughout the lungs is measured by four categories: 0 = small opacities are absent or so few they do not reach a category 1; 1 = small opacities definitely present but few in number; 2 = small opacities numerous but normal lung markings are still visible; and, 3 = small opacities very numerous and normal lung markings are usually partly or totally obscured. An interpretation of category 1, 2, or 3 means there are opacities in the lung which may be used as evidence of pneumoconiosis. If the interpretation is 0, then the assessment is not evidence of pneumoconiosis. A physician will usually list the interpretation with two digits. The first digit is the final assessment; the second digit represents the category that the doctor also seriously considered. For example, a reading of 1/2 means the doctor's final determination is category 1 opacities but he considered placing the interpretation in category 2.

[23]There are two general categories of small opacities defined by their shape: rounded and irregular. Within those categories the opacities are further defined by size. The round opacities are: type p (less than 1.5 millimeter (mm) in diameter), type q (1.5 to 3.0 mm), and type r (3.0 to 10.0 mm). The irregular opacities are: type s (less than 1.5 mm), type t (1.5 to 3.0 mm) and type u (3.0 to 10.0 mm). JOHN CRAFTON & ANDREW DOUGLAS, RESPIRATORY DISEASES 581 (3d ed. 1981).

[24]*See Zeigler Coal Co. v. Director [Hawker]*, 326 F.3d 894 (7th Cir. 2003) and *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.) (greater probative weight may be given to the interpretations of a dual qualified radiologist in comparison to a physician who is only a B reader.)

Medical Opinion

Although the chest x-ray evidence is insufficient, Mr. Roberts may still show the presence of pneumoconiosis through documented and reasoned medical opinion in accordance with 20 C.F.R.§ 718.202 (a) (4). In Mr. Roberts' case, several physicians have expressed an opinion about his pulmonary condition. Prior to summarizing their assessments, a review of the new pulmonary function tests and blood gas studies helps place their opinions into perspective.

Pulmonary Function Tests

Exhibit	**Date / Doctor**	**Age / Height**	**FEV¹ pre[25] post[26]**	**FVC pre post**	**MVV pre post**	**% FEV¹ / FVC pre post**	**Qualified[27] pre post**	**Comments**
DX 1	Aug 17, 1999 Dr. Moore	62 64"	1.49 1.72	3.12 2.99	55 65	48% 57%	Yes[28] No	Severe obstructive defect, significant response to bronchodilator
DX 21	Jan. 21, 2002 Dr. Baker	64 64"	1.15	2.44		47%	Yes[29]	

Arterial Blood Gas Studies

Exhibit	**Date / Doctor**	**pCO_2 (rest) pCO_2 (exercise)**	**pO_2 (rest) pO_2 (exercise)**	**Qualified[30]**	**Comments**
DX 1	Aug 17, 1999 Dr. Moore	41.3	66	No[31]	Abnormal

[25]Test result before administration of a bronchodilator.

[26]Test result following administration of a bronchodilator.

[27]Under 20 C.F.R. § 718.204 (b)(2)(i), to qualify for total disability based on pulmonary function tests, for a miner's age and height, the FEV1 must be equal to or less than the value in Appendix B, Table B1 of 20 C.F.R. § 718, **and either** the FVC has to be equal or less than the value in Table B3, or the MVV has to be equal **or** less than the value in Table B5, or the ratio FEV1/FVC has to be equal to or less than 55%.

[28]The qualifying FEV1 number is 1.56 for age 62 and 64″; the corresponding qualifying FVC and MVV values are 2.00 and 62, respectively.

[29]The qualifying FEV1 number is 1.53 for age 64 and 64″; the corresponding qualifying FVC and MVV values are 1.97 and 61, respectively.

[30]To qualify for Federal Black Lung Disability benefits at a coal miner's given pCO_2 level, the value of the coal miner's pO_2 must be equal to or less than corresponding pO^2 value listed in the Blood Gas Tables in Appendix C for 20 C.F.R. § 718.

[31]For the pCO_2 of 40 to 49, the qualifying pO_2 is 60, or less.

DX 21	Jan. 21, 2002 Dr. Baker	46	61	No	

Physician Evaluations[32]

Dr. Charles A. Moore
(DX 19)

On August 17, 1999, Dr. Moore, board certified in internal medicine, conducted a pulmonary evaluation of Mr. Roberts. Mr. Roberts had mined coal for 20 years and reported no tobacco use history. Since 1975, he struggled with chronic shortness of breath, repeated bronchitis and pneumonia. His physical exertion capacity was limited. Upon physical examination, Dr. Moore heard expiratory rhonchi and wheezing. A previous chest x-ray had been interpreted as positive for pneumoconiosis. The blood gas study was abnormal and the pulmonary function test established the presence of a severe pulmonary obstruction.

Dr. Moore concluded, "this patient most likely does have pneumoconiosis" and is unable to return to coal mining.

Dr. Fuad M. Zeid
(DX 20)

In his December 22, 1999 treatment note for Mr. Roberts, Dr. Zeid noted that Mr. Roberts had chronic shortness of breath which had worsened over the years. He had 20 years of coal mine employment and stopped mining coal in 1975. Mr. Roberts had used steroid therapy for the past 10 years for COPD (chronic obstructive pulmonary disease). A prior chest x-ray report indicated the presence of pneumoconiosis and a pulmonary function test revealed a moderate obstructive breathing limitation.

Based on clinical symptoms, the abnormal pulmonary function test and chest x-ray, Dr. Zeid diagnosed pneumoconiosis which caused dyspnea and exercise limitations. His symptoms were consistent with chronic black lung disease. Dr. Zeid explained that Mr. Roberts did not have a "significant tobacco abuse" history or "exposure to other respiratory irritants besides coal dust." He believed Mr. Roberts was not capable of manual labor for any length of time. Dr. Zeid prescribed bronchodilator therapy.

[32]Under 20 C.F.R. § 725.414 (a) (2) (i), Mr. Roberts was entitled to submit no more than two medical reports to support his case. The new evidence developed since May 1999 contains the opinions of four doctors, which initially seems to exceed the regulatory limit. However, upon examination, I believe the opinions from Dr. Zeid and Dr. Lovelady are actually notes from their treatment of Mr. Roberts for his breathing problems. As treatment notes, their comments are admissible under 20 C.F.R. § 725.414 (a) (4) and do not count against the regulatory limit. The other two pulmonary evaluations by Dr. Baker and Dr. Moore are admissible under 20 C.F.R. § 725.414 (a) (2) (i) and do not exceed the stated limit.

Dr. G. Keith Lovelady
(DX 20)

In his September 2001 treatment notes, Dr. Lovelady, board certified in pulmonary disease, internal medicine and critical care, noted poor air movement and wheezing in Mr. Roberts' lungs. Mr. Roberts had a long term obstructive breathing defect and associated chronic shortness of breath. After twenty-five years of coal mining, Mr. Roberts stopped working as a coal miner in 1975. According to Dr. Lovelady, Mr. Roberts was "never a smoker." He also believed the radiographic evidence was positive for the presence of pneumoconiosis. The pulmonary function test established that Mr. Roberts had a moderately severe pulmonary obstruction.

According to Dr. Lovelady, Mr. Roberts' history, physical examination and pulmonary function test results were consistent with the presence of coal workers' pneumoconiosis. He prescribed steroids and bronchodilators.

Dr. Glen R. Baker
(DX 21)

On January 21, 2002, Dr. Baker, board certified in pulmonary disease and internal medicine, conducted a pulmonary evaluation of Mr. Roberts. Mr. Roberts was a former coal loader with 20 years in the mines. He suffered from long term shortness of breath and periodic bronchitis. According to Dr. Baker, Mr. Roberts "never smoked." In 1996, he had an aortic valve replaced. Upon physical examination, Dr. Baker noted pulmonary wheezing. He read the chest x-ray as positive for pneumoconiosis. The pulmonary function test revealed a moderate obstruction. During the arterial blood gas study, Mr. Roberts displayed moderate hypoxemia at rest.

Based on his examination, Dr. Baker first diagnosed coal workers' pneumoconiosis based on the chest x-ray and coal dust exposure history. Second, in light of the pulmonary function test, he determined Mr. Roberts had COPD related to "coal dust/cigarette smoking." Finally, Mr. Roberts' moderate hypoxemia and chronic bronchitis were due to "coal dust/cigarette smoking." Mr. Roberts suffered a moderate pulmonary impairment due to his coal dust exposure and could not return to coal mining.

Discussion

To have probative value, a medical opinion must be both documented and reasoned. As to the first probative value factor, a physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co*., 8 B.L.R. 1-65 (1985). In other words, a doctor who considers an array of medical documentation that is both long (involving comprehensive testing) and deep (includes both the most recent medical information and past medical tests) is in a better position to present a more probative assessment than the physician who bases a diagnosis on a test or two and one encounter. Finally, in light of the extensive relationship a treating physician may have with a patient, the opinion of such a

doctor may be given greater probative weight than the opinion of a non-treating physician. *See Downs v. Director, OWCP*, 152 F.3d 924 (9th Cir. 1998) and 20 C.F.R. § 718.140 (d).

The second factor affecting relative probative value, reasoning, involves an evaluation of the connections a physician makes based on the documentation before him or her. A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co*., 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned, the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91 (1988).

With these probative factors in mind, based on the documentation before them, Dr. Moore, Dr. Zeid and Dr. Lovelady presented generally reasoned medical conclusions that Mr. Roberts has pneumoconiosis. However, as set out below, I give little probative to their consensus diagnosis due to their use of positive radiographic evidence and an inaccurate history of cigarette smoking for Mr. Roberts.

In reaching his conclusion, Dr. Moore relied on the following documentation: 20 years of coal mine employment; no tobacco use history; a chest x-ray positive for pneumoconiosis; and abnormal pulmonary tests showing a significant obstructive defect. Based on that information, Dr. Moore's finding of pneumoconiosis is reasonable. However, his diagnosis has no probative value because two of the four factors he utilized are inaccurate.

To the extent that Dr. Moore's conclusion represents a finding of medical pneumoconiosis based on chest x-ray evidence, that opinion collapses. Dr. Moore didn't specifically identify the chest x-ray that showed the presence of coal workers' pneumoconiosis. If he relied on a positive interpretation obtained prior to May 1999, that reliance is contrary to Judge Tureck's conclusion that the radiographic evidence did not support a finding of pneumoconiosis. If Dr. Moore based his conclusion on some chest x-ray obtained between May 1999 and August 1999, that reliance is also misplaced since I have determined the preponderance of the chest x-ray evidence developed since May 1999 is negative for the presence of pneumoconiosis.[33]

Despite Dr. Moore's reliance on an inaccurate chest x-ray, his opinion might nevertheless support a finding of legal pneumoconiosis as defined by the regulations if other elements of his documentation were accurate. Clearly, Mr. Roberts' had an obstructive impairment. And, in light of the work and social histories presented to him, Dr. Moore's implicit selection of coal dust as the cause of the pulmonary impairment would be reasonable. Yet, I have determined that the social history presented to Dr. Moore is incorrect. Rather than no tobacco use, Mr. Roberts has a multiple pack-year history of cigarette use which presents cigarette smoke as another possible cause of Mr. Roberts' pulmonary obstruction. Thus, Dr. Moore did not have the correct social history before him. As a result, his opinion loses probative value because he did not analyze Mr. Roberts' pulmonary impairment in terms of two possible respiratory irritants.

[33]His reliance on such a film is further problematic since no such x-ray is in the record.

For essentially the same reasons, the medical opinions of Dr. Zeid and Dr. Lovelady have diminished probative value. Both doctors believed the radiographic evidence was positive for pneumoconiosis and Mr. Roberts was essentially a non-smoker. In fact, Dr. Zeid emphasized the absence of a history of significant cigarette smoke or other irritants besides coal dust.

Dr. Baker's medical opinion also has diminished probative value for both similar documentation and dissimilar reasoning considerations. Dr. Baker specifically divided his diagnosis into medical and legal pneumoconiosis. Based on Mr. Roberts' history of coal mine employment and his belief that the January 21, 2002 chest x-ray showed the presence of black lung disease, he diagnosed medical coal workers' pneumoconiosis. As discussed above, based on the interpretation of a more qualified physician, I have determined the January 21, 2002 film is negative for pneumoconiosis. As a consequence, Dr. Baker's medical pneumoconiosis diagnosis is not probative.

Dr. Baker also diagnosed legal pneumoconiosis, but with an interesting twist. He determined Mr. Roberts' COPD, which caused a moderate impairment, was related to "coal dust/cigarette smoking." Such a diagnosis might be probative because I have determined Mr. Roberts did have both significant coal dust and cigarette smoke exposure. Unfortunately for Mr. Roberts, Dr. Baker's legal pneumoconiosis diagnosis still fails due to the combination of a unique reasoning problem and a common documentation deficiency.

The reasoning problem exists because after he annotated that Mr. Roberts never smoked, Dr. Baker then attributed cigarette smoking as a partial cause of Mr. Roberts' pulmonary impairment. Without further explanation, Dr. Baker's causation conclusion makes no sense. If Mr. Roberts never smoked cigarettes as presented by Dr. Baker, that risk factor could hardly be a partial cause of Mr. Roberts' pulmonary condition.

In terms of documentation, to the extent Dr. Baker relied on the absence of cigarette use to tie coal dust exposure to Mr. Robert's pulmonary obstruction, his diagnosis of legal pneumoconiosis is not probative. In a manner similar to the other three physicians, Dr. Baker's social history for Mr. Roberts is incorrect because he annotated that Mr. Roberts "never smoked."[34]

In summary, due to significant documentation errors, and in one case coupled with a reasoning problem, the four medical opinions developed since May 1999 are not sufficiently probative to establish the presence of pneumoconiosis. As a result, Mr. Roberts is not able to prove the presence of pneumoconiosis through medical opinion under 20 C.F.R. § 718.202 (a)(4).

CONCLUSION

Neither the radiographic evidence nor the medical opinion developed since May 1999 establish the presence of coal workers' pneumoconiosis in Mr. Roberts' lungs. As a result, in his present subsequent claim, Mr. Roberts has failed to establish one of the requisite conditions for

[34]In prior exams of Mr. Roberts, Dr. Baker first reported Mr. Roberts smoked as a teenager (1993) and later indicated he was a non-smoker (1996).

entitlement under the Act previously adjudicated against him. Accordingly, under 20 C.F.R. § 725.309 (d) (3), his subsequent claim for black lung disability benefits must be denied.

ORDER

The Motion to Dismiss the claim of MR. JAMES A. ROBERTS is **DENIED**.

The claim of MR. JAMES A ROBERTS for benefits under the Act is **DENIED**.

SO ORDERED:

A

Richard T. Stansell-Gamm
Administrative Law Judge

Date Signed: May 3, 2004
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Worker's Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN.: Clerk of the Board, Post Office Box 37601, Washington, DC 20013-7601. See 20 C.F.R. § 725.478 and § 725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, DC 20210.

Attachment 1

[48 Fed. Appx. 140, Peabody Coal Co. v. Director, Office of Workers' Compensation Programs, (C.A.6 2002)]

United States Court of Appeals,
Sixth Circuit.

PEABODY COAL COMPANY; **Old Republic Insurance Company, Petitioners**,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, **United States; Carol Williams Dukes, Respondents.**

No. 01-3043
Oct. 2, 2002

[Page 141] On Appeal from the Benefits Review Board.

Before SUHRHEINRICH and BATCHELDER, Circuit Judges; and LITTLE, District Judge (The Honorable F.A. Little, Jr. United States District Judge for the Western District of Louisiana, sitting by designation.)

PER CURIAM.

Petitioners Peabody Coal Company and Old Republic Insurance Company (collectively "Peabody") appeal from the decision of the Benefits Review Board ("the Board") affirming the Administrative Law Judge's ("ALJ") award of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901- 945 ("the Act"), to Respondent Carol W. Dukes.

I. Introduction

Peabody raises two issues on appeal. First, it claims Dukes should be denied black lung benefits because his claim, as a subsequent claim, was not timely filed pursuant to the three-year statute of limitations in 30 U.S.C. § 932 (f). Second, it asserts that, even if Dukes's claim was timely, no benefits should be awarded because Dukes did not present evidence of a material change in his condition since the dismissal of his earlier claim, as required by *Sharondale v. Ross*, 42 F.3d 993 (6th Cir. 1994), and his subsequent claim is therefore barred by res judicata.

Dukes and the Director of the Office of Worker's Compensation Programs (the "Director") respond[35[1]] and Dukes asserts his second claim was timely[36[2]] because, although the

[35[1]]In front of the Board, the Director intervened as a party in interest and is therefore a Respondent in this appeal.

[36[2]]The Director, in his separately filed Respondent's Brief, concedes that Duke's subsequent claim was untimely. Therefore, Dukes stands alone in this argument.

subsequent claim was filed outside the statute of limitations, he had filed an initial claim for benefits with the Department of Labor within the statute of limitations period, and that is all § 932 (f) requires. Moreover, both Dukes and the Director argue that Dukes has necessarily exhibited a material change in his condition because the ALJ found Dukes now has pneumoconiosis, whereas an Examiner denied his initial claim, finding he did not.

Relying on the plain language of the statute and our previous decision of *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), we find the statute of limitations applies to all Part C claims for black lung benefits filed by a miner,[37[3]] not just the initial one, and begins to run upon the communication to the miner of a medical determination of total disability due to pneumoconiosis. However, we find that Dukes's claim is nonetheless timely because he had not received a "medical determination" under the statute until 1995.

Furthermore, we find the ALJ did not provide sufficient analysis to support the finding that Dukes has manifested a change in condition since his prior denial. We hereby affirm the decision of the Board that Dukes's second claim was timely filed, but vacate the award and remand this cause to the ALJ for a determination of whether Dukes had exhibited a material [page 142] change in his condition between the denial of his first claim and the filing of his second.

II. Background

Respondent Mr. Carol William Dukes was born in 1928. He worked in the coal mines of Kentucky for nineteen years. Dukes's employment with Peabody terminated on December 31, 1985, when the mine he had worked in for the previous seventeen years closed. Dukes never returned to mine work.

Between 1987 and 1988, Dukes received opinions from several doctors indicating he was suffering from pneumoconiosis, more commonly known as "black lung disease." On February 17, 1988, Dukes filed a claim with the Department of Labor under the Act. The Department of Labor identified Peabody Coal Company as the responsible coal mine operator[38[4]] liable for the claim under 20 C.F.R. §§ 725.490- 725.493, and notified them of the pending litigation.

In order to qualify for benefits under the Act, Dukes had to show (1) he was totally disabled (2) due to pneumoconiosis (3) arising at least in part out of coal mine employment. *See Tussey v. Island Creek Coal Co*., 982 F.2d 1036, 1038 (6th Cir. 1993). The Department of Labor Examiner denied the claim on July 25, 1988, finding, in spite of doctors' opinions to the contrary, Dukes did not meet any of the three criteria required for an award of benefits. Pursuant to Department of Labor procedures, Dukes submitted additional medical evidence, but his claim

[37[3]]A Part C benefit is paid by the former employer of the miner. This is as opposed to a Part B benefit which is paid by the federal government.

[38[4]]The responsible coal mine operator is the employer that would be responsible for any Part C benefits awarded to a miner. It is the employer mine that the claimant last worked for, for more than one year. 20 C.F.R. § 725.495.

was again denied on August 29, 1989. Dukes failed to file a timely appeal to the ALJ's office and otherwise declined to pursue his administrative remedies.

Dukes never returned to work, but filed a second application for benefits with the Department of Labor on August 7, 1995. The Department denied this second claim on January 23, 1996, again finding Dukes did not have pneumoconiosis. This time, however, Dukes chose to pursue his administrative options and filed a timely appeal with the ALJ, and the matter was transferred to that office.

A hearing was held, and the ALJ found (1) Dukes's second claim had been timely filed, (2) Dukes had nineteen years of coal mine employment, (3) Dukes had established a material change in condition since the prior denial, (4) Dukes had pneumoconiosis arising out of his coal mine employment, and (5) the pneumoconiosis rendered him totally disabled. Benefits were awarded beginning August 1, 1995.

Peabody filed a timely notice of appeal with the Benefits Review Board, claiming Dukes's 1995 claim should have been time barred based on the three-year statute of limitations that should have commenced whenever Dukes first received a medical determination of his disease, sometime between 1987 and 1988. On September 9, 1999, the Board affirmed the ALJ's findings, stating Dukes's claim was timely because the statute of limitations only applies to a miner's very first claim for benefits. Since Dukes's 1988 claim was timely, all subsequent claims would be as well. Peabody timely filed a motion for reconsideration that the Board denied in November 2000. Peabody then filed a timely petition for review with this Court.

III. The Statute of Limitations

Peabody claims Dukes's August 7, 1995 claim was outside the three-year statute of [page 143] limitations provided in 30 U.S.C. § 932(f), and should be denied as untimely.

A. Application of the Statute of Limitations to Subsequent Claims

Section 932 (f) states "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later: (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." The provision's implementing regulation, 20 C.F.R. § 725.308 (a), further provides:

> A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later ...

Accordingly, under the language of the statute and the regulation together, the statute of limitations begins to run upon (1) a medical determination of (2) total disability (3) due to pneumoconiosis (4) which has been communicated to the miner.

Peabody claims the ALJ and the Board have erred as a matter of law in misapplying the statute of limitations to Dukes's claim. Legal errors are reviewed by this Court de novo. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 684-85 (6th Cir. 2002); *U.S. v. Leake*, 998 F.2d 1359, 1362 (6th Cir. 1993).

There is a rebuttable presumption that any claim made for black lung benefits is timely. 20 C.F.R. § 305.728(c). The burden of proof is therefore on Peabody to show the claim was outside the statute of limitations period. 20 C.F.R. § 725.103. Dukes was first diagnosed with pneumoconiosis between 1987 and 1988 after examinations by a host of doctors. Dukes's second claim was filed in August, 1995. Accordingly, Dukes's second claim was filed some seven years after his initial diagnosis. However, Dukes agrees with the Board and argues the three-year window only applies to the first Part C claim filed by the miner. Peabody argues it applies to any and all Part C claims made after a medical determination of total disability due to pneumoconiosis.

This Court has previously addressed the statute of limitations on black lung claims. In *Sharondale*, this Court held the three-year statute of limitations resets if the miner has returned to mine work after the initial denial of his claim. In that case, the Court stated the three-year period begins again on each determination of total disability due to pneumoconiosis, and cannot run until the miner finally retires. *Sharondale*, 42 F.3d at 996. However, we expressed no opinion whether the statute applies to a subsequent claim if the miner does not return to the mines.

We addressed the statute of limitations again in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). In *Kirk*, we stated the statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he had the disease earlier. *Id*. at 607-08. In *Kirk*, the miner misinterpreted the doctor's reports and thought he had been diagnosed with pneumoconiosis, and accordingly, filed a claim for benefits. The claim was denied. The miner was later properly diagnosed with pneumoconiosis and subsequently refiled for benefits. The Board granted the claim, and we affirmed, holding the filing of a premature claim is not sufficient to trigger the statute of limitations. *Id*. at 607-08. In other words, in [page 144] *Kirk*, there was no "medical determination" absent a valid medical opinion, notwithstanding prior knowledge or existence of the disease.

In *Kirk*, this Court summarily stated the three-year statute of limitations applies not only to the initial claim after a medical determination, but to all subsequent claims as well. Because *Kirk* essentially turned on whether the miner had previously received a "medical determination," there is some question as to whether our analysis of the subsequent claims issue was dicta.[39[5]] This Court considers as dicta any observation in the opinion of the court unnecessary to the holding in that case. *See Kyle v. OWCP*, 819 F.2d 139, 143 (6th Cir. 1987). The argument can be made that since *Kirk* was ultimately decided based on whether the miner had received a "medical determination," the analysis of whether the statute of limitations applies to subsequent claims was unnecessary to the holding. We need not express an opinion as to whether this commentary is dicta because, even if it is, we reach the same result today.

[39[5]]Though not raised in his brief, Duke's counsel asserted at oral argument that the decision in *Kirk* that the statute of limitations applies to subsequent claims is dicta.

Proper interpretation of the statute of limitations necessarily begins with its language. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 237, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Walker v. Bain*, 257 F.3d 660, 666 (6th Cir. 2001). The plain language of 30 U.S.C. § 932 (f) provides "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later - (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." Peabody contends "any claim" in the statute means any claim filed by the claimant miner, whether it be his initial claim or a subsequent claim, must be filed within three years of the medical determination of pneumoconiosis. On its face, there seems to be little room for dispute - any claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis.

In the past, this Court has recognized that the Act should be read with every ambiguity determined in favor of the miners. The "Act is remedial legislation that should be liberally construed so as to include the largest number of miners within its entitlement provisions." *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1989). *See also Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984); *Haywood v. Sec'y of Health and Human Services*, 699 F.2d 277, 281 n. 7 (6th Cir. 1983); *Miniard v. Califano*, 618 F.2d 405, 410 (6th Cir. 1980); *Morris v. Mathews*, 557 F.2d 563, 566 (6th Cir. 1977). However, we find no ambiguity in this language. The mere fact that the Board has repeatedly interpreted the statute differently does not give credence to the assertion that this statute is ambiguous.

It is our job to interpret Congress's intent based, first and foremost, on the language they chose. "When we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end." *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163, 166 (6th Cir. 1995) (en banc). Accordingly, and in concurrence with the analysis in *Kirk*, we hold that any and all claims filed more than three years after a medical determination of total disability due to pneumoconiosis are untimely. If Congress intended an alternate interpretation, they alone are charged with the chore of rewriting the statute to evidence their desires.

[page 145] Any other interpretation of the statute of limitations is virtually unworkable. The Board has adopted a standard allowing all claims as timely, no matter how long between claims, as long as the first one was filed within three years of the medical determination. *See, e.g., Andryka v. Rochester & Pittsburgh Coal Co*., 14 Black Lung Rep. 1-34 (Ben.Rev.Bd. 1990); *Faulk v. Peabody Coal Co*., 14 Black Lung Rep. 1-18 (Ben.Rev.Bd. 1990). Dukes argues this is the proper standard under the statute. Beside the fact that the Board's interpretation is clearly inapposite to the plain language of the statute, such a rule would render the statute of limitations essentially useless. Adopting this broad standard destroys the balance a statute of limitations negotiates between the rights of a victim and the ability of a defendant to maintain evidence and be free of potential lawsuits. Under Dukes's view, there would be no statute of limitations at all for subsequent claims if a claimant managed to file one within the three-year window. Given the language used, evidencing some desire to maintain a statute of limitations, this extreme result could not have been what Congress intended.

B. When Dukes's Statute of Limitations Began to Run

Having determined the statute of limitations applies to subsequent claims, we now must discern when it began to run on Dukes's claim. Under 30 U.S.C. § 932(f), the statute was triggered when Dukes first received a "medical determination of total disability due to pneumoconiosis."

The term "medical determination" is not defined in the statute. The requirement of a "medical determination," however, necessarily implicates that an undiagnosed case of pneumoconiosis does not trigger the statute. Moreover, in *Kirk*, we held that a self-diagnosed case of pneumoconiosis does not trigger the statute, whether the disease actually exists or not. *Kirk*, 264 F.3d at 607 ("[T]he statute makes what Kirk believes about his condition irrelevant to the initiation of the limitations clock."). That is, a miner cannot give himself a "medical determination." A doctor must make the determination. *Id*. at 608.[40[6]] Moreover, in *Sharondale*, we expressly stated that the statute of limitations does not exist to bar premature claims. *Sharondale*, 42 F.3d at 996 ("[A] claimant must be free to reapply for benefits if his first filing was premature."). Our discussion in *Sharondale* was not limited to undiagnosed or self-diagnosed cases, but logically extends to all situations in which the miner has filed a claim but has not yet contracted the disease - including claims filed on the basis of a misdiagnosis.

In light of the denial of his 1988 claim, Dukes's condition was, for legal purposes, misdiagnosed. Although alluded to in *Sharondale*, we have not directly addressed the issue whether a misdiagnosis constitutes a "medical determination" capable of triggering the statute of limitations. But the Tenth Circuit has and concluded that it does not:

> When a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. However, a final finding by an Office of Workers' Compensation Program adjudicator that the claimant is [page 146] not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations. *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1507 (10th Cir.1996).

We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a misdiagnosis does not equate to a "medical determination" under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a proper medical determination.

[40[6]] In an unpublished opinion, *Clark v Karst-Robbins Coal Co.*, No. 93-4173, 1994 WL 709288 (6th Cir. 1994), we held a successful state workers' compensation claim does not constitute a "medical determination" of total disability where the opinion deemed the worker to have been "totally disabled," but no doctor had. *Id*. at *1.

This standard makes sense because pneumoconiosis is judicially recognized as a progressive disease. *See, e.g., Mullins Coal Co. v. Director*, 484 U.S. 135, 138, 108 S.Ct. 427, 98 L.Ed.2d 450 (1987); *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 7-8, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976); *Gray v. SLC Coal Co*., 176 F.3d 382, 386 (6th Cir.1999); *Glen Coal Co. v. Seals*, 147 F.3d 502, 510 (6th Cir.1998). *Sharondale*'s admonition against triggering the statute in the face of a premature claim is founded on this progressivity. *Sharondale*, 42 F.3d at 996. If we adopt Peabody's view, we would be ignoring the fact that a miner may not contract pneumoconiosis until well after his tenure in the mines has ended.

Furthermore, pursuant to the rejection of his claim in 1988, Dukes should have believed that his doctors had been mistaken and he was free of the disease. It is inherently unjust for the statute of limitations to be running on a miner who does not know he has the disease. This result is commensurate with the Federal Regulations. For the statute to begin to run, the relevant regulation requires a communication of the determination to the miner. 20 CFR § 725.308(a). Accordingly, there is a notice aspect to the triggering of the statute, and the denial of Dukes's claim overrides any notice that may have previously existed.

In *Kirk*, we voiced the concern that if we hold, as we do today, a misdiagnosis does not trigger the statute of limitations, we open the door for unscrupulous miners to shop for compliant doctors, willing to give a diagnosis of pneumoconiosis where the evidence does not support it. *Kirk*, 264 F.3d at 608 n. 5. However, even if a miner were to find such a doctor, there must nonetheless be ample evidence for the Examiner or the ALJ to award benefits. As is evident in Dukes's case, the Examiner does not simply accept the word of the doctor. Therefore, such a scenario is not a great concern unless the miner could also find a compliant Examiner. Besides, if we hold to the contrary, an unscrupulous employer could avoid future liability by purposely making a premature determination--a far more unchecked concern. *See id*. at 608 n. 5. Moreover, notwithstanding these dishonest scenarios which were proposed in *Kirk*, we submit a third, more licit, concern. Holding the miner responsible for a *genuine* misdiagnosis unjustly holds him responsible for the principled medical judgment of a doctor, presumably far more skilled and educated than the miner.

The Act has always been interpreted with every ambiguity weighed in favor of the miner. As noted above, we believe Congress intended to include as many miners under the Act as possible. *Miniard*, 618 F.2d at 410; *Morris*, 557 F.2d at 566. [page 147] Accordingly, we weigh the above concerns so as not to begrudge honest miners their benefits simply because there may exist dishonest ones. There are enough administrative checks to limit any or all illegitimate claims. Holding that a misdiagnosis nonetheless triggers the statute would defeat Congress's intention that this be a remedial statute by excluding too many honest miners from its benefits.

Moreover, there is an obvious interest in having miners who may be suffering from pneumoconiosis checked and treated as soon as possible. Holding that a misdiagnosis triggers the statute would ultimately lead to the undesired effect of miners being overly cautious about being screened for the disease. If a miner knows that a misdiagnosis will ultimately mean that he can never again seek benefits should he eventually contract this progressive disease, he will be less likely to be proactive in seeking medical advice during the early stages.

In Kirk, we stated in dicta that:

> Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims. *Kirk*, 264 F.3d at 608 (footnote omitted).

However, we decided *Kirk* on the basis that the miner there *did not* have a medically supported claim. *Id*. at 607. Today, we have carefully considered this issue and hold otherwise.

Our holding does not defeat the purposes of the statute of repose. The statute here exists to promote the quick filing of worthy claims. If a miner receives a proper medical determination, yet sits on his claim for three years, he will be barred from bringing it.

In sum, none of the opinions of Dukes's 1988 doctors constituted a "medical determination" because Dukes's claim was denied. He ultimately did not receive a "medical determination" until 1995 when he was *properly* diagnosed with the disease. Since he filed his claim that same year, the statute of limitations is not at issue here. Accordingly, we hereby affirm the decision of the Benefits Review Board, and find Dukes's claim was timely filed, albeit for reasons different than those stated by the Board.

IV. Material Change

Peabody next alleges that, even if Dukes's claim was timely filed, it should have been denied based on lack of new evidence. Under 20 C.F.R. § 725.309(b), a later claim is merged with an earlier claim if the earlier claim is still pending. If, however, the earlier claim had already been denied, the later claim is viewed as a "request for modification" if it meets the requirements of § 725.310. 20 C.F.R. § 725.309(c). Under § 725.310, a later claim can only be a request for modification if it had been filed less than a year after denial of the first, otherwise it is a "subsequent claim." Dukes filed his second claim well more than a year--in fact, approximately seven years--after denial of the first. Accordingly, Dukes's claim is governed by the "subsequent claim" provision:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §§ 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in [page 148] accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. § 725.309(d) (emphasis added).

In other words, even if a subsequent claim is timely under the statute of limitations, the claim will be barred by principles of res judicata unless the miner can show a material change in his condition.

To prove a claim, a miner must show he is totally disabled by pneumoconiosis arising at least in part out of coal mine employment. *Sharondale*, 42 F.3d at 998 n. 2 (quoting *Tussey*, 982 F.2d at 1038). Dukes's first claim was denied because the Examiner determined, first and foremost, he did not suffer from pneumoconiosis. This Court, in *Sharondale*, adopted the following test to determine whether a material change has occurred:

> [T]he ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Sharondale*, 42 F.3d at 997-98.

Since, primarily, the existence of pneumoconiosis was the element originally adjudicated against Dukes, he must now show, through a comparison of the old and new evidence, that not only does he now suffer from pneumoconiosis, but that his condition has worsened. A simple disagreement with the original evidence is not enough.

The standard of review is well settled in cases appealed from the Benefits Review Board. We will affirm any finding of fact made by an ALJ if supported by substantial evidence. *See Glen Coal Co. v. Seals*, 147 F.3d 502, 510 (1998); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 133 (6th Cir. 1996); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230-31 (6th Cir. 1994); *Director, OWCP v. Rowe*, 710 F.2d 251, 254 (6th Cir. 1983). The ALJ's findings of fact will be upheld if reasonable and supported by a fair and accurate reading of the record. See *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). We will review any finding of law, exercising plenary review authority, de novo. *SeePeabody Coal Co. v. Greer*, 62 F.3d 801, 804 (6th Cir. 1995). The ALJ determined that Dukes has contracted, and is totally disabled by, pneumoconiosis. Whether Dukes had contracted pneumoconiosis by August 1995 is a factual determination, and we review using the substantial evidence standard.

Sharondale involved facts somewhat similar to these here. The miner, Milford Ross, had applied for benefits in 1979. In 1981, the ALJ found his x-ray evidence negative for pneumoconiosis, and denied the claim. Ross returned to mine work after the denial, and again filed for benefits in 1985. This time, the ALJ viewed the x-ray evidence as positive for pneumoconiosis. On this basis, the ALJ had determined a "material change" had occurred. We remanded the case to the ALJ for further proceedings, holding the ALJ did not properly analyze the facts. The ALJ's basis for determining that a "material change" had taken place was not annunciated and not supported by the evidence. [page 149] The 1985 claim was supported by

positive and negative x-ray readings by both "B" readers and "non-B" readers,[41][7] but the 1979 readings were as well. We were "unable to discern on the record before [us] whether the ALJ merely disagreed with the previous characterization of the strength of the evidence or whether Ross indeed had shown the existence of a material change in his condition since the earlier denial." *Sharondale*, 42 F.3d at 999. In other words, the ALJ must find the material change based on an actual worsening of the condition, and not based on his disagreement with the Examiner who denied the initial claim. Furthermore, the ALJ must provide an evidentiary comparison in his opinion to support the existence of a "material change." *Id*. at 997-98.

In *Kirk*, the ALJ made a similar error to that in *Sharondale* and failed to show a worsening of the condition between the first and second claims. However, in that case, the doctors treating the miner, Jack Kirk, all generally agreed he had pneumoconiosis by the time of the second claim, and that the condition had worsened in the previous years. *Kirk*, 264 F.3d at 609. This Court upheld the decision, in spite of the ALJ's error[42][8] because there was substantial and overwhelming evidence in the record before us to support the ALJ's unpremised conclusion, notwithstanding his lack of analysis.

To determine here whether there is substantial evidence to support the ALJ's findings, we must delve into Dukes's muddled medical history. It is unnecessary to recount all of Dukes's examinations, but a brief sampling is at least required. In regard to his claims, Dukes was first examined in 1986. In that year, Dr. Ballard Wright conducted a complete exam, including a chest x-ray and diagnosed Dukes with pneumoconiosis. Within the next year, Dukes was examined by Dr. Jackson at the University of Kentucky and a Dr. Gallo. Both Drs. Jackson and Gallo concluded that Dukes did not suffer from pneumoconiosis. Ultimately, in 1987, Dukes was examined by Drs. Gary Givens and Valentino Simpao. These doctors concluded Dukes, did, in fact, have pneumoconiosis. All in all, for this first claim, there were a total of six x-rays, read by a total of ten doctors a total of twelve times. Of the twelve readings, eight were positive, four were negative, including both positive and negative readings by "B" readers.

Dukes was examined for his second claim beginning in 1995. A brief sample of his examinations includes the following. Dr. Simpao examined Dukes again and opined that Dukes was indeed suffering from pneumoconiosis. This was consistent [page 150] with Simpao's 1987 diagnosis. Dukes was then successively examined by Drs. Selby, Fino, and Branscomb. Selby, a "B" reader, took an x-ray of Dukes's chest and concluded he was not suffering from

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[41][7]A "B" reader is a radiologist who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis and greater weight may be given to his diagnosis. *Sharondale*, 42 F.3d at 999 n. 4 (quoting *Blackburn v. Director,* 10 BRBS 108 (1979)).

[42][8]In *Kirk*, this court considered the potential injustice of remanding the case to the ALJ because of the error:

> It is noteworthy that a remand, urged by [the employer], would almost certainly result in an ALJ decision in favor of claimant on this point. Such a decision, as [the employer] acknowledges, would be supported by substantial evidence and thus immune from review, making it unclear what jurisprudential purpose would be served by adopting [the employer]'s position. On the other hand, Mr. Kirk has been waiting for more than nine years for a decision from the federal system regarding his black-lung benefits. Avoiding further years of delay on a remand on a foregone conclusion would certainly be, in the word of [*Director, OWCP v. Quarto Mining Co.*, 901 F.2d 532, 536 (6th Cir. 1990], avoiding "potential injustice." *Kirk,* 264 F.3d at 610 n. 8.

pneumoconiosis, but instead was suffering from a form of emphysema caused by his heavy smoking. Dr. Branscomb, also a "B" reader, and Dr. Fino performed reviews of the medical evidence and likewise concluded Dukes did not suffer from pneumoconiosis. Dr. Maurice Bassali, another "B" reader, then reviewed Dr. Selby's x-ray and concluded the x-ray was positive for pneumoconiosis.[43][9] For this second claim, Dukes had four x-rays taken, read fourteen times by thirteen physicians. These x-rays produced nine readings of negative for pneumoconiosis, with several positive and negative readings by "B" readers.

In his opinion dated December 22, 1997, the ALJ accepted the opinion of Dr. Bassali, finding pneumoconiosis on the latest x-ray. The ALJ gave more weight to Bassali's opinion, as is appropriate given Bassali's qualifications as a "B" reader. *See Warman v. Pittsburgh & Midway Coal Mining Co*., 839 F.2d 257, 261 n. 4 (6th Cir. 1988). The ALJ, however, never analyzed the substantive differences between the new evidence and the 1988 evidence. He simply accepted Bassali's opinion, providing no discussion on whether the disease had progressed since 1987.[44][10] The ALJ made no mention in his decision as to how this evidence was at all different from the first, except to the effect that, this time, it was Dr. Bassali who read the x-rays.[45][11] This lack of analysis is uncannily identical to the error in *Sharondale* that required a remand.

A subsequent claim is not an appeal of the first claim, but an independent claim for benefits based on new evidence. "No minor (sic) is entitled to benefits simply because his claim should have been granted." *Sharondale*, 42 F.3d at 998. Accordingly, since the ALJ's opinion lacks the kind of analysis required by *Sharondale*, we remand this cause to the ALJ for further proceedings. In accordance with *Sharondale*, the ALJ is to compare the 1988 evidence with the 1995 evidence and grant Dukes's claim if and only if the evidence shows his condition had worsened since the initial denial.[46][12]

V. Conclusion

In sum, for the foregoing reasons, we **AFFIRM** the decision of the Board that Dukes's 1995 claim was timely filed. However, we **VACATE** the award affirmed by the Board and **REMAND** this cause to the [page 151] ALJ for a determination of whether the 1995 evidence reflected a material change in Dukes's medical condition from 1988.

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[43][9]It is unclear whether Dr. Bassali was the only doctor to read this particular x-ray. The ALJ's opinion states in one part that "this interpretation is contradicted by the readings of the same x-ray by Dr .J. Selby and B. Branscomb" and in another part states the x-ray read by Dr. Bassali "is over one year more recent than the preceding x-ray." Dukes's brief is similarly unclear, but from the medical records, it appears Drs. Selby and Branscomb's diagnoses came from this same x-ray.

[44][10]The ALJ never made mention of the progression of the disease. He only stated his conclusions, relying on Bassali's opinion that Dukes now had pneumoconiosis.

[45][11]Bassali's opinion was based on the newest x-ray, but it is unclear whether this x-ray was different from the others, including the ones in 1987, or if Bassali just disagreed with some of the previous readings.

[46][12]Incidentally, this case is distinguishable from *Kirk*. Many, if not most, of Dukes's doctors disagreed with the opinion that Dukes had pneumoconiosis in 1995. Therefore, there is a genuine split and not the general acknowledgement that was present in *Kirk*.

BATCHELDER, Circuit Judge.

The majority's opinion highlights, and attempts to remedy, a notable flaw in Congress's and the Department of Labor's framework for dealing with the problem of black lung disease in coal miners. Specifically, it holds that the "medical determination of total disability due to pneumoconiosis," 20 C.F.R. § 725.308(a), which starts the clock running on the statute of limitations, is stopped and reset by the legal determination that the miner seeking benefits does not qualify for those benefits at that time.

While I doubt not the wisdom of the policy the Court announces today, I am unable to acquiesce in a reading of § 725.308(a) that is contrary to its plain language. Under the regulation, a medical determination of total disability due to pneumoconiosis is made and communicated to the aggrieved miner by a medical professional. A legal professional's ruling on that medical determination is incidental to whether the statute of limitations had begun to run pursuant to the terms of § 725.308(a).

I respectfully dissent.